BOARD OF APPEALS CASE NO. 078	*	BEFORE THE
APPLICANTS: Stephen Quick and Leroy Smith	*	ZONING HEARING EXAMINER
REQUEST: Rezone 20.76 acres from CI/B3 to B3; 2511, 2513, 2515 and 2517 Pulaski Highway, Edgewood	*	OF HARFORD COUNTY
	*	
	*	Hearing Advertised Aegis: 2/25/98 & 3/4/98
HEARING DATE: April 20, 1998		Record: 2/27/98 & 3/6/98
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ZONING HEARING EXAMINER'S DECISION

The Applicants, Stephen E. Quick and Leroy Smith are seeking a rezoning of their property from CI/B3 to B3.

The Applicants own 20.76 acres located at 2511, 2513, 2515 and 2517 Pulaski Highway, Edgewood, Maryland which lots are more particularly identified on Tax Map 66, Grid 1A, Parcels 533 (Lots 1-4) and 271. The parcel is presently "split-zoned" CI/B3 and is located entirely within the First Election District.

Mr. Anthony McClune, Chief of Current Planning for the Harford County Department of Planning and Zoning appeared and testified in support of the requested rezoning. Mr. McClune described the Comprehensive Rezoning Process which took place in 1982 and 1989. In 1982 there was a very intense zoning review conducted during the comprehensive review. No notice was given to property owners in 1982 unless their property was subject to a downzoning or if it was requested by the property owner. In 1982, the County Council adopted a policy of maintaining existing zoning unless a property owner or the council initiated review. In 1982, in an effort to attract manufacturing concerns to the county, the CI classification was created to replace the existing M1 zone. In 1989, the Council did not raise any issues on its own initiative. In accord with its earlier policy in 1982, the 1989 Council did not consider a property changing zones from B3 to CI a downzoning consequently, no notice to property owners whose property was affected in this way was sent. No issue was raised during 1989 regarding this property. Mr. McClune stated that the subject property would have fallen into the "no notice" category in both 1982 and 1989.

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Mr. McClune described the improvements made to the intersection of Routes 40 and 24 during the last 18 months. The witness further stated that the 1982 and 1989 council could not have known about the exact location or configuration of this intersection at the time of the last comprehensive rezoning. Additionally, since the subject parcel was not raised as a particular issue during the 1982 or 1989 process, the Council had no particular details available regarding this parcel when it maintained the CI classification.

Mr. McClune concluded by testifying that the Department of Planning and Zoning supported the Applicants' request for rezoning during the 1997 comprehensive zoning review. There were discussions in 1997 regarding the elimination of the CI classification between the Council and the Department of Planning and Zoning.

Next to testify was Stephen Quick, one of the Applicants. Mr. Quick and Mr. Smith have owned the subject property since 1973. At the time the purchase contract was entered, the property was zoned R3. While the property was under contract, Quick petitioned for rezoning to B3 which was granted. Quick stated that B3 was necessary because he and Smith had planned a retail shopping center at this location and rezoning to B3 was a necessary purchase contingency. After successfully rezoning the property and purchase, the Applicants' filed and obtained approval for a retail shopping center. They subdivided the property and sold one of the five lots created by the subdivision.

The witness testified that he was not aware that the zoning classification of his property had changed to CI in 1982 and indicated that he had not obtained notice of that change. He also was not aware that shopping centers were not permitted uses in the CI zone. Mr. Quick stated that had he been aware of these facts he would have objected to the rezoning in 1982. The witness also indicated that he got no notice in 1989 regarding his property and first became aware of the CI rezoning classification and its prohibition against shopping centers during the 1997 comprehensive review. The Applicants, now aware of the facts, filed a request for rezoning during the 1997 comprehensive review, which request was reviewed and approved by the County Council but which is pending due to referendum vote regarding the comprehensive rezoning by the voters of Harford County.

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Mr. Robert Rosenberger appeared as an expert project engineer and site plan designer. The witness described the Applicants' site plan design and testified that the shopping center approval was originally granted in 1974. The property consists of 38.93 total acres with 12.87 acres in the B3 zone. 20.76 acres of the CI zone is, by virtue of this petition, to be rezoned B3 The total parcel is located in the southwest corner of Route 40 and West Shore Drive. The Applicants are planning to use the remaining CI property for senior housing. The witness contends that senior housing is an appropriate use at this location which would act as a transition zone between the commercial shopping center and the residential community.

Mr. Denis Canavan appeared as an expert in planning, zoning and land use matters. Mr. Canavan first stated that he agreed with the Department of Planning and Zoning regarding the boundaries of the neighborhood, describing those boundaries as the B&O Railroad on the north, Route 24 to the west and Otter Point Creek to the south and east. Along the north side of the property runs Route 40 which is a four lane divided highway at this point. To the west runs Route 24 which is also a four lane divided highway at this point. The new construction 18 months ago created a new connection between these two roads and created a new signalized intersection. West Shore Drive borders the property to the east and is a county road built to commercial use standards.

Mr. Canavan concurred with Mr. McClune's earlier description of the zoning history of the property and added that the subject property is currently shown as Medium Intensity on the Harford County Master Land Use Plan. B3 is in compliance with that Plan. Mr. Canavan stated that the 1977 Master Plan had a neighborhood center symbol shown on this parcel, consistent with Applicants' earlier shopping center approval.

Mr. Canavan stated that, in his opinion, a rezoning from B3 to CI was a downzoning and property owners should have been given notice and the opportunity to object in 1982. Further, based on his review of the records, the witness opined that the 1982 council did not know that there was earlier shopping center approval on this parcel. Additionally, rezoning the property CI in 1982 was inconsistent with the Master Plan designation because of the neighborhood center designation on the property.

It was the opinion of the witness that a series of mistakes regarding this property was made during 1982 and 1989. Canavan indicated that B3 is the appropriate zoning for the subject parcel and is compatible with now existing adjoining uses. He did not believe CI uses would be appropriate and would likely have a detrimental impact on adjoining uses. In the opinion of the witness, the proposed use is consistent with the Master Plan, will not result in dangerous traffic conditions or jeopardize the lives and property of persons working or living in the area, will not have a detrimental impact to adjoining properties or impair the purposes of the zoning code or the public interest and would not have an adverse effect on public health, safety or welfare. The witness concluded by stating that the proposed rezoning is consistent with good planning and zoning principles and practice and would not set a precedent for the rezoning of other properties.

There were no persons who appeared in opposition to the requested rezoning.

CONCLUSION:

In Maryland, a parcel of land may not be rezoned simply because the property owner wants the property rezoned or even if the zoning authority feels the property should be rezoned. Before a property can be rezoned there must be strong evidence of mistake in the zoning classification or a change in the character of the neighborhood since the last comprehensive rezoning. These principles and their corollaries were summarized by the Maryland Court of Appeals in Boyce v. Sembly, 25 Md. 43, 344 A.2d 137 (1975). The Court set forth the change-mistake rule which may be summarized as follows:

1. The zoning classification assigned to a parcel of land is presumed to be correct.

2. A piecemeal zoning classification of a parcel of land cannot be granted unless and until the presumption of correctness is overcome.

3. The presumption of correctness can only be overcome by strong evidence that there was a mistake in the comprehensive zoning or there has been a change in the character of the neighborhood of the subject property since the last comprehensive zoning which justifies the piecemeal zoning classification.

4. Once a change in the character of the neighborhood or a mistake in the last comprehensive zoning is established, rezoning is permissible but not mandated.

5. However, once an applicant establishes the requisite change in the character of the neighborhood or a mistake in the comprehensive zoning, the denial of the requested reclassification must be sufficiently related to the public health, safety or welfare to be upheld as a valid exercise of the police power. Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972). In the case of a denial where the applicant has met his burden of establishing a change in the character of the neighborhood or a mistake in the comprehensive zoning, the zoning authority must find facts, upon the evidence, which would support a denial. Messenger v. Board of County Commissioners for Prince George's County, 259 Md. 693, 271 A.2d 166 (1970), The factual determination of the zoning authority must be supported by substantial, competent and material evidence contained in the record. Not every potential problem will serve to validate a decision to deny a requested rezoning; the problems must be real and immediate, not future and imaginary. Furnace Branch Land Company v. Board of County Commissioners, 232 Md. 536, 194 A.2d 640 (1963).

As stated by the Maryland Court of Special Appeals, the presumption of the validity of comprehensive rezoning,

> "...is overcome and error or mistake is established when there is probative evidence to show that the assumptions of premises relied upon by the Council at the time of comprehensive rezoning were invalid. Error can be established by showing that at the time of comprehensive rezoning the Council failed to take into account then existing facts or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. Error or mistake may also be established by showing that events occurring subsequent to rezoning have proven that the Council's initial premises were incorrect...It is necessary not only to show facts that exist at the time of comprehensive rezoning but also which, if any, of those facts were not actually considered by the Council...Thus, unless there is appropriate evidence to show that there were then existing facts which the Council, in fact, failed to take into account or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive rezoning is not overcome, and the question of error is not "fairly debatable". Joyce v. Smelly, supra; Rockville v. Stone, 27 Md. 655, 319 A.2d 536 (1974)

Thus the Maryland Courts have laid out a two-pronged test. First, has a change in the character of the neighborhood or a mistake been established that would permit the rezoning of the property. Second is whether the property should be rezoned.

In the opinion of the Hearing Examiner, a number of mistakes occurred regarding this property beginning in 1982. First, the 1982 Council mistakenly believed that rezoning from B3 to CI was not a "downzoning", yet the uses allowed in each zone indicate that this change is a downzoning, prohibiting certain uses previously allowed in a B3 zone. The particular property in question is the best example. Here, a request for rezoning was made by the contract purchaser to rezone his property from R3 to B3 which would allow the construction of a shopping center, the very reason for the purchase. The rezoning was granted and a "neighborhood center" classification was placed on this property as it appeared on the Master Plan after the property owners obtained county approval to construct a shopping center. Apparently, this designation was not known to the 1982 Council and their failure to send notice to impacted property owners did not bring it to the attention of the Applicants in this case. Moreover, the CI classification, by virtue of the neighborhood center classification, was inconsistent with the Master Plan in 1982.

Compounding this error, properties that were not changing zones in 1989 were not given notice since these properties would not be an issue during the upcoming comprehensive review, thus, the property owner was once again not alerted to the earlier change of zone and its prohibition on his earlier permitted use. The maintenance of CI designation on this property was also inconsistent with the Master Plan in 1989.

Lastly, the Council, in 1989, could not have been aware of the location and configuration of the new intersection of Route 24 and Route 40 which only finished construction 18 months ago.

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Each of the Applicants' witnesses presented unrebutted and credible testimony that B3 was the appropriate classification for this property and further, that the shopping center proposed by the Applicants was an appropriate use. This parcel was subject to intense review during the 1997 comprehensive rezoning process. Based upon review of all of the facts, the Department of Planning and Zoning, the Planning Advisory Board and the Harford County Council supported the rezoning of the property to B3. The inescapable conclusion is that several mistakes were made by the Council in 1982 and 1989 and that the property should be rezoned to B3.

In the opinion of the Hearing Examiner, therefore, the Applicant has met its burden of proof by establishing that a legal mistake was made by the Council during the 1982 and 1989 Comprehensive Zoning Review and further, that the property is appropriately zoned as B3. The Hearing Examiner recommends that the requested rezoning be approved.

Date July 6, 1998

William F. Casey
Zoning Hearing Examiner